Supreme Court, U.S.
FILED
JUL 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN POZSGAI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF AMICI CURIAE OF FERCOM AQUACULTURE CORPORATION, RICKY LEE MCGOWN, JAMES ALLEN MOSELEY AND MARY ANN MOSELEY IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF FERCOM AQUACULTURE CORPORATION, RICKY LEE MCGOWN, JAMES ALLEN MOSELEY AND MARY ANN MOSELEY IN SUPPORT OF PETITIONER

With the written consent of all parties, FERCOM Aquaculture Corporation, Ricky Lee McGown, and James Allen and Mary Ann Moseley respectfully submit this brief as *Amici curiae*. *Amici* have filed the consents of the parties with the Clerk of the Court.

Amici curiae, FERCOM Aquaculture Corporation, Ricky Lee McGown, and James Allen and Mary Ann Moseley, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

INTEREST OF AMICI CURIAE

Amici curiae are a company and individuals who have been aggrieved by the actions of United States Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") in connection with those agencies' unprecedented attempts to gain control of *amici's* dry, solid-ground property under the guise of enforcing the anti-water pollution provisions of the Clean Water Act ("CWA"), §§33 U.S.C. 1251-1376.

FERCOM Aquaculture Corporation ("FERCOM") is a Missouri company engaged in the business of raising certain aquaculture products, primarily catfish, in farm ponds it has constructed in areas which previously consisted mainly of cultivated corn and soybean fields. In August, 1989, the Corps and EPA asserted CWA jurisdiction over these cultivated fields and claimed that the construction of catfish ponds in the fields constituted a violation of the CWA. Ironically, the government claimed that FERCOM was destroying the government's "valuable wetlands" (i.e., the corn and bean fields) by building water thereon. In September, 1989, FERCOM responded by bringing an action for a declaratory judgment, *FERCOM Aquaculture Corporation v. United States, et al.*, Cause No. N89-0116-C (E.D.Mo.), seeking a declaration that the Corps/EPA have no CWA jurisdiction over FERCOM's dry, solid-ground property. The government responded by filing and vigorously briefing a Motion to Dismiss (now pending), contending that FERCOM has no right to bring such a suit and that FERCOM's sole redress must be to wait until the government brings an enforcement action against it; the government claims that then, and only then, can FERCOM assert lack of jurisdiction.

Similarly, in August, 1989, *amicus* Rick McGown filed a declaratory judgment action, *McGown v. United States, et al.*, Cause No. N89-0103-C (E.D.Mo.), seeking a judicial declaration that the Corps/EPA have no jurisdiction over his farm fields. McGown filed his action only after extensively, but unsuccessfully, attempting to negotiate for a "§404 permit" (which was unnecessary in the first place) with the Corps/EPA in order to repair his half-century old levee along a small

creek and to relocate/construct the levee in an area landward of its former location. Using so-called "§404 mitigation" as a device more akin to "economic extortion," the Corps/EPA refused to give Mr. McGown a §404 permit unless he would "set aside" for the government one-fourth of his 255 acres of farm property. Only after a year-and-a-half of "running the 404 permitting gauntlet," and after having been repeatedly called a "flagrant and multiple violator" of the CWA, did Mr. McGown file his action seeking judicial intervention. As is the case in *FERCOM*, the government responded by vigorously attempting to have Mr. McGown's case dismissed — contending that he too has no remedy but to sit and wait for the government to bring an enforcement action against him.

Three business days after Mr. McGown filed his lawsuit, the government brought an action against Mr. McGown's neighbors, *amici* Moseleys, (*United States v. James Allen and Mary Ann Moseley*, Cause No. N89-0107-C (E.D.Mo.)), claiming that the construction of a levee in the Moseley's farm fields located near a small creek constituted an act of water pollution. Consequently, the Moseleys also find themselves embroiled in litigation with the Corps/EPA, revolving largely around the question of whether their dry, solid-ground soybean fields are "navigable waters" subject to regulation by the Corps/EPA.

All three of the above mentioned cases arise from the Corps/EPA's rapidly evolving "land-grab" strategy. The issues before this Court in Pozsgai have nationwide significance to *amici* and other farmers, landowners, contractors, and developers across the country — especially in light of the recent attempts by the Corps/EPA to capitalize on a bottomless environmental pork-barrel by drastically expanding their regulatory jurisdiction (without notice and comment to the public) far beyond the scope of the CWA and the boundaries of the United States Constitution.

Amici are all engaged in farming activities in the heartland of America. Farming has long been recognized as the backbone of this nation:

> Whenever there are in any country uncultivated lands and unemployed poor it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for men to labor and live on . . . . The small landowners are the most precious part of the State.

T. Jefferson, *Writings*, Vol. XIX, p. 17. As stated by Daniel Webster: "Let us never forget that the cultivation of the earth is the most important labor of man." D. Webster, *Remarks on Agriculture*, Boston, 13 Jan., 1840. It is noteworthy that the policies the Corps/EPA would impose on our citizens are also not without historical precedent: "All taxes must, at last, fall upon agriculture." E. Gibbon, *Decline and Fall of the Roman Empire*, Ch. 8. As demonstrated herein, the implications of the *Pozsgai* case far transcend Mr. Pozsgai's individual situation and are indicative of problems of a nationwide magnitude — problems which make this Court's intervention necessary.

SUMMARY OF ARGUMENT

The CWA is an anti-water pollution statute. It is not a "land-use zoning act" nor is it even a "wetlands protection act." Indeed, CWA does not prohibit the "destruction" of a wetland by draining or the removal of all vegetation; however, the placement of rock, sand or certain other enumerated materials on wetlands "violate" Section 301 of the CWA. This feature of the law is significant, for Congress did not intend that the mere placement of fill on dry areas constitutes a discharge of a "pollutant" "into water." Even assuming the Corps did have jurisdiction over Mr. Pozsgai's property, the Corps and all federal agencies had already approved a nationwide permit for the fill work conducted. 33 C.F.R. §330.5(a)(26). Far from being a "raper of the public environment," Mr. Pozsgai's activities cleaned up a vacant lot/dumpsite. *See* Petition for Writ of Certiorari, pp. 3-6.

The harsh punishment imposed upon Mr. Pozsgai is, according to the lower court's admonition, intended to send a chilling message — supposedly to "environmental water polluters." The true message and practical effect of "Pozsgai justice," however, is not to warn real large-scale polluters, but to bludgeon into submission those farmers and

landowners who might otherwise oppose the government's recently energized attempts to take over their property. The combination of the agencies' long-recognized penchant for overregulation and their new attempt to expand CWA jurisdiction to regulate dry land presents an alarming dilemma to farmers, landowners, and developers. If the agencies' "bargaining position" is fortified with the threat of "*Pozsgai* justice" — it will be a rare landowner indeed who would dare to risk his freedom and economic survival in order to defend his property. Regulatory "compliance" will be little more than "capitulation" and the cost of compliance will be justice and fair play. The horrors experienced by *Amici curiae* are, unfortunately, only the tip of the iceberg of regulatory nightmares which await landowners if the agencies are allowed to continue unchecked in their emerging land-grab fervor. In light of these recently developing circumstances, *Amici curiae* respectfully submit that it is imperative that this Court review the compelling issues raised by Mr. Pozsgai.

This Court is Mr. Pozsgai's last resort to prevent injustice from occurring — injustice not limited to Mr. Pozsgai but with widespread ramifications to the "regulated public" across the country. *Amici* fully adopt and incorporate by reference all portions of Mr. Pozsgai's Petition for Writ of Certiorari, and focus primarily upon issues I and II. Amici respectfully submit that the government's failure to prove both (1) the requisite interstate commerce connection with the activity sought to be regulated, and (2) the discharge of a "pollutant" "into water" as required by the CWA — results in a conviction woven from threads far too loose and thin for hanging Mr. Pozsgai.

ARGUMENT

Introduction: "Section 404": The Government's Penchant for Overregulation

The Clean Water Act ("CWA"), which was known as the Federal Water Pollution Control Act at the time of its enactment in 1972, is a comprehensive effort by Congress to restore and maintain the "chemical, physical, and biological intregrity of the nation's waters." 33 U.S.C §1251(a). However laudatory these goals may be, the actual legal requirements are found in other sections of the law. The cornerstone of the regulatory scheme established by the CWA is Section 301, 33 U.S.C. §1311, which prohibits the discharge of "any pollutant" into "navigable waters," except when in compliance with various sections of the CWA, including section 404, 33 U.S.C. §1344. Section 404 establishes a program whereby the Corps issues permits for the "discharge of dredged and fill material." The section 404 program is somewhat of an orphaned hybrid which arose out of the combination of the historic regulation by the Corps of obstructions to navigation under the Rivers and Harbors Act of 1899, 33 U.S.C. §403, and the environmental concerns of the CWA. A troublesome shortcoming of the section 404 program is that it bears, at best, a strained relationship to the purposes of the CWA, particularly with respect to the enforcement action brought against Mr. Pozsgai. The purpose of the CWA is to protect water quality, not to regulate land use.[1]

The substance of the CWA's jurisdictional boundaries has not been altered *by Congress* since 1977. Even then, when Congress considered the 1977 amendments to section 404, it attempted to curb what many members of Congress have perceived as "the Corps' penchant for overregulation, particularly in cases of de minimus environmental concern." *1902 Atlantic, Ltd. v. Hudson*, 574 F.Supp. 1381, 1397-98 (E.D.Va. 1983). The *1902 Atlantic, Ltd.* Court's quotation from a

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[1] The CWA does not even mention the term "wetlands," and section 404 was mainly concerned with the open water disposal of dredged material. The Corps' role in operating the section 404 program emanated from its historic role in regulating obstructions in navigable waters.

colloquy during floor debate on the Senate bill (S.1952) between Senator Muskie (the Senate manager of the 1977 amendments) and Senator Bentsen is illustrative of Congress' concern for the Corps' penchant for overregulation:

> MR. BENTSEN: Mr. President . . . . *Section 404 has become a symbol to many Americans of how a well-intentioned legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country.*
>
> * * *
>
> Section 404 *has become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism* . . . .
>
> * * *
>
> During Senate consideration of the conference report on the Clean Water Act of 1977, Senator Muskie, who also was one of the Senate conferees, stated that the statements made during Senate debate, such as the statements above, adequately reflect the legislative intent with respect to Section 404.

1902 Atlantic Ltd., 574 F.Supp. at 1398, n. 16 (emphasis added) *quoting* Legislative History of the Clean Water Act of 1977, Vol. 3-4, pp. 470, 901-02 (1978).

Unfortunately, despite the concerns expressed in 1977 by Senators Bentsen and Muskie, things have become worse — not better. The "penchant for overregulation" (by both the Corps and the EPA) now victimizes farmers and landowners nationwide, including amici curiae, as the Corps/EPA attempt to use the CWA to expand their

"regulatory turf" out of the water, out of the swamps and marshes, and straight onto the dry land.[2]

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[2] Recently, in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), cert. denied, 109 S.Ct. 1131 (1989), Circuit Judge Merritt sua sponte went out of his was to criticize the Corps' over-expansive jurisdictional approach:

> [T]he Corps has now expanded the definition of "navigable waters" to include any creek or stream or moist area . . . . "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles from a navigable waterway would become wetlands." [citation omitted]. The Corps' definition has apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. *A farmer's low lying farmland or a homeowner's low lying backyard — adjacent to a small stream or creek but many miles from any navigable waterway — has apparently been converted into government property no longer subject to control or improvement by the owner without government permission.* A statute that does not mention "wetlands" has apparently been read to include simply "moist land adjacent to a creek."
>
> The framers of the Constitution were solicitious of the rights of landowners — *especially small farmers struggling for survival* — not to have land appropriated by the government. They therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.

United States v. Larkins, 852 F.2d at 193 (Merritt, J., concurring) (emphasis added). (Unlike *amici's* cases, *Larkins* involved land covered in part with "knee deep water" and cypress trees, see 659 F.Supp. 76, 79, containing numerous sloughs and depressions which defendants filled, 852 F.2d at 190, and which previously "tended to be covered by standing water." *Id.* at 191.) Although this Court has held that a "taking" claim is no defense to a §404 enforcement action, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985), as indicated by Judge Merritt in Larkins, it is fundamentally wrong for the government to try to seize control of its citizens' property under the pretext of enforcing an "anti-water pollution" statute. *See* Exec. Order 12630, March 15, 1988, 53 Fed. Reg. 8859, *"Governmental Actions and Interference with Constitutionally Protected Property Rights"* (directing each agency to account for Fifth Amendment "taking" concerns in carrying out actions, including regulatory and permitting functions).

1. The New Approach: Regulating Dry Land

a. The Corps' Regulations Purport to Regulate Only Truly Aquatic Areas

The new trend (i.e., regulating under §404 as if it were a "land preservation statute" instead of an "anti-water pollution statute"), stands in direct contradiction to the Corps/EPA's regulations. The agency regulations defining wetlands have remained unchanged since 1977. After defining "wetlands," the regulations then clarify the definition by stating that "[w]etlands generally include swamps, bogs, marshes, and similar areas." 33 C.F.R. §328.3(b). As stated in the preamble to the 1977 regulations, this language was included to demonstrate the intent of the Corps to include "*only* truly aquatic areas." 42 Fed.Reg. 37,129 (1977) (emphasis added).[3]

Notably, the Corps' clarifying sentence of its "wetlands definition" does *not* state that "[w]etlands generally include swamps, bogs, marshes, and corn fields, soybean fields, and vacant lots." Thus, unless corn fields, soybean fields, and vacant lots are "similar areas" to "swamps, marshes, and bogs," 33 C.F.R. §328.3(b), regulatory jurisdiction should not attach. *See Blue Cross Association v. Harris*, 622 F.2d 972, 977 (8th Cir. 1980) (under commonly accepted rules of statutory construction, if the plain language is clear in its context, it is controlling); *T. L. Hunt, Inc. v. C.I.R.*, 562 F.2d 532, 535 (8th Cir. 1977). Furthermore, the rule of *ejusdem generis* demands that "where general words follow an enumeration of specific things, the general words are read as applying only to other items akin to those specifically enumerated." *See Harrison v. P.P.G. Industries*, 446 U.S. 578, 588 (1980); *Columbia Pictures v. Professional Real Estate Investors*, 866

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[3] This was further restated by Regulatory Guidance Letter 86-9, issued August 27, 1986, by Brig. Gen. Offringa:

> Neither do we intend the definition of "wetlands" to be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation. Thus, we have listed *swamps, bogs and marshes* at the end of the definition at 323.2(e) to further clarify our intent *to include only truly aquatic areas* . . . .

(RGL 86-9) (emphasis added).

F.2d 278 (9th Cir. 1989). The general words "similar areas" follow the more specific words "swamps, marshes, bogs" in the definition of wetlands contained in 33 C.F.R. §328.3. Consequently, for land to be considered a "wetland," it must be the same kind of area as a swamp, marsh, or bog. The Corps/EPA, however, have recently attempted to discard such a reading, and now would interpret the phrase "similar areas" to mean "other areas" — including cultivated farm fields and other typically non-aquatic areas.

Why the new quest to regulate dry land? A recent environmental group's publication sheds light on the Corps' motive — bureaucratic self-preservation:

> For civil engineers in general, environmental projects offer a boundless future. *For the Corps in particular they mean job security.* The day of huge new river basin projects has passed; with growing public resistance to such projects, and tightening budget constraints, the Corps could be relegated to custodian status. *Environmental engineering offers the Corps steady work, an image pure and true — and an almost bottomless pork barrel.*

Audubon, July, 1990, at 111 (emphasis added). Thus from the Corps' own self-interest arose a new Manual for making "jurisdictional calls" over supposed "wetlands."

b. The New Federal Wetlands Delineation Manual: The Tool for the Agencies' Emerging "Land-Grab" Doctrine

Encouraged by the "pork barrel" opportunities, and apparently emboldened by President Bush's 1988 pledge of "no net loss of wetlands," on January 10, 1989, the Corps, EPA, and two other agencies "jointly" published a document entitled "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" (the "Manual") which sets forth "*mandatory*" technical criteria and methods for identifying and delineating jurisdictional wetlands. Formerly using a "three-parameter test" to define "wetlands," the 1989 Manual at best gives lip service to this concept. In practice, the Manual purports to

allow the Corps/EPA to remove the "wet" from "wetlands."[4] The new Manual has resulted in major substantive expansions of wetland boundaries to areas which are clearly non-aquatic. Nevertheless, in promulgating the Manual, the agencies failed to follow the notice and comment requirements set forth in the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. §553, which seek to ensure public participation, fairness, and mature consideration of rules of general application. *N.L.R.B. v. Wyman Gordan Co.*, 394 U.S. 759, 764 (1969); *see Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726, 728 (E.D.Va. 1988), *aff'd without published op.*, No. 89-2905, slip. op. at 1 (4th Cir., Sept. 19, 1989) (documents published by federal agency which purport to establish methods for delineating "wetlands" are substantive decisions which require notice and comment). *Amici* are challenging the validity of the Manual, as are others. *See Mulberry Hill Development Corp. v. United States*, Cause No. PN89-2639 (D.Md. 1989) (pending).

c. Nationwide Reaction to the Corps/EPA's "Land-Grab"

The magnitude of the concern over the Corps/EPA's wetlands regulatory expansion (and abuse) is growing nationwide. *See* Exhibit 1 hereto, New York Times, April 24, 1990: "For Farmers, Wetlands Mean a Legal Quagmire." The new Manual and the expanding regulatory policies of the agencies have recently met with sharp criticism by Congress. For example:

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[4]The Corps' earlier *guidance* manual required that an area contain wetland hydrology, hydrophytic vegetation, and hydric soils in order to constitute a wetland. Under the 1989 Manual, however, the principle focus is on whether the soil type is "hydric." If so, the Corps/EPA will *imply* the remaining two parameters (vegetation and, most significantly, hydrology). This "methodology" carries frightening implications to farmers and owners of bottomland property where almost all soils are "hydric." This is because hydric soils are formed at a glacial pace — not reflecting current conditions. As noted by one Court, the term "hydric soils" generally pertains "to the wetness condition when those layers were laid down in long-past geological history. Use of the term 'hydric soils' does not really assist in a determination of whether the root zone soil meets the requirement of the regulation." *Leslie Salt Co. v. United States*, 700 F.Supp. 476, 487 (N.D.Cal. 1989).

> Unfortunately, the current direction of our wetlands policy is progressing in ways that were never envisioned by Congress. The changes that are being attempted do not follow Congressional intent. Rules and regulations are being written by bureaucrats who believe they have long been stifled over at EPA during the past eight years, and now, giving them an inch, they are taking a mile.
>
> *The Federal Manual for Identifying and Delineating Jurisdictional Wetlands, written from within the bowels of the Interior Department makes serious changes in our definition of wetlands. These changes were never proposed or discussed before a Committee of this Congress, nor were the changes proposed in the Federal Register. This new definition substantially impacts our nation, particularly rural areas, and enhances our government's "land grab" abilities.*
>
> * * *
>
> If we want to shut down our farms — our agriculture producers, the breadbasket of the world — then, yes, include our farms and agricultural productive land. This will have a tremendous, untold effect on rural America. And if that is the case, let's talk about just compensation for the taking of privately held land. Landowners in this country deserve respect and rights that many other countries in this world do not even acknowledge. We cannot in good conscience trample one of our most basic freedoms in this country.

February 28, 1990 Testimony of Congressman Emerson before Subcommittee on Water Resources, Committee on Public Works Transportation: "Wetlands Hearing" (emphasis added).

Similarly, President Bush, who announced the "no net loss of wetlands" policy which energized the Corps/EPA to draft the Manual in question, has stated the Executive Department's concerns with the agencies' overregulation:

> We are trying to do a better job of getting these agencies to work together, *but you have zealots in various levels of the bureaucracy*. We will try very hard from the top on down to get the clarification that is needed to avoid this frustration among farmers. I am not happy with this . . . .

June/July, 1990, *Farm Journal*, p. 17 (emphasis added).

2. Impact Upon the Regulated Community

The national significance of *Pozsgai*, and the nationwide magnitude of the problem faced by farmers and landowners is heightened by the newly-energized Corps/EPA's attempts to slither out from their aquatic jurisdictional boundaries onto land which is normally dry. A revealing (and alarming) portrait of the agencies' view of their expanding jurisdiction is found in a recent EPA publication which states: "If there's not a wetland in your neighborhood, there's probably one nearby." EPA: *America's Wetlands: Our Vital Link Between Land and Water*, p. 1 (Feb., 1988). Landowners across the nation have become outraged and adamantly disagree with the agencies' claims that their dry, solid-ground constitutes "navigable water" under the CWA, and that merely moving dirt (not "cellar dirt," 33 U.S.C. §1362(6)) in a field is considered a "discharge of a pollutant into water."

Significant, and not surprising, is that many, if not most, landowners find themselves confronted with the agencies' jurisdictional claim only *after* they have already commenced work on what any reasonable person would view as a non-aquatic area. When the agencies assert jurisdiction and inform the landowner that he or she is a "violator" and a "water polluter" subject to the wide gambit of potential penalties and injunctive relief set forth in the CWA, see 33 U.S.C. §1319, the landowner is placed in a precarious position indeed. He can capitulate, face an "enforcement action," or attempt to obtain judicial declaratory relief. The agencies, however, typically capitalize on their superior bargaining position and the extreme imbalance of economic and other resources to in effect "extort mitigation" by (1) "offering the carrot" of the permit while (2) "wielding the club" of enforcement, including the threat of imprisonment, fines, costly litigation and/or "restoration" —

alternatives and risks the agencies know the unfortunate landowner can ill-afford.

a. The "Permitting Process": "Take-it-or-Leave-It"

As *amici* and numerous others nationwide have learned from bitter first-hand experience, the so-called "section 404 permitting process" essentially amounts to a "take-it-or-leave-it" proposition by the agencies. An example of the "carrot/stick" coercive tactics used by the agencies is that *amicus* McGown was informed by the Corps that if he did not go along with the Corps' mitigation demands (give up one-fourth his farm) then "you will find out just how expensive it will be [to fight the Corps]." He has.

Thus, on the one hand, the landowner can capitulate to the "no net loss" and "full restoration/mitigation" demands of the agencies. (See – February 7, 1990 Memo. of Agreement between Corps/EPA (regarding "mitigation sequencing," "no net loss," *etc.*, 1990 Fed. Reg., Vol. 55, No. 48, p. 9210)). Capitulation means that the landowner "saves his hide" but forfeits his property rights to do so.

b. Declaratory Relief: A Costly Remedy

On the other hand, having no identifiable administrative remedy under which to dispute the "jurisdictional call," *Swanson v. United States*, 600 F.Supp. 802, 805 (D.Idaho 1985), *aff'd* 789 F.2d 1368 (9th Cir. 1986), the landowner can file suit contesting jurisdiction.[5] Once in court, however, the aggrieved person will be faced with an expen-

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[5] Compare, *Leslie Salt Co. v. United States*, 660 F.Supp. 183, 185 (N.D.Cal. 1987) ("the decision on [§404] jurisdiction is to be made by the district court in a plenary trial and not by the Corps") and *United States v. Key West Towers, Inc.*, 720 F.Supp. 963, 966, n. 8 (S.D.Fla. 1989) ("a declaratory judgment action would have resolved the issue [of whether or not t he Corps had jurisdiction in the first place] . . . ."), *with Southern Pines Assoc. v. United States*, Cause No. C-89-453-N (E.D.Va. Aug. 11, 1989) (landowner's declaratory judgment action challenging CWA jurisdiction dismissed by lower court which *sua sponte* ruled that the CWA precludes pre-enforcement review), *appeal docketed*, No. 89-1790 (4th Cir. Aug. 28, 1989)

sive legal battle just to keep the suit there. It is now clear that when a landowner seeks declaratory judicial intervention, the agencies will customarily respond by vigorously fighting for dismissal on grounds that the landowner is seeking "pre-enforcement review."[6] Consequently, before even reaching the merits of the claim, the landowner's resources are drained from fighting an expensive and protracted "briefing battle" simply to keep the case in court.[7] The agencies' position in these cases — i.e., that the landowner has an adequate opportunity for review if and when the agencies bring an enforcement action against him — in reality offers absolutely no relief to the aggrieved citizen. No person in his right mind would want to face "Pozsgai charges" or even civil penalties ($25,000.00 a day) and/or injunctive relief simply to resolve a legimately disputed jurisdictional call. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In essence, the agencies' strategy is: "Resist and, we will break you." Unfortunately, if the Corps/EPA are allowed to use "Pozsgai justice" to back up their threat, they may be right.

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[6] In addition to the Motions to Dismiss in the lawsuits brought by *amici* FERCOM and McGown, *Mulberry Hill Development Corp. v. United States, et al.*, Cause No. PN89-2639 (D.Md.) is a pending case wherein the government seeks to dismiss the developer's declaratory judgment action which seeks judidical determination that its property is not wetlands; the developer is specifically challenging the 1989 Manual.

[7] Time and economic resources are always in the hand of the government. For example, amicus McGown's costs in merely trying to keep his case in court have already far surpassed his annual income — with a devastating effect on his family of five who subsist at or near the poverty level. *Amicus* FERCOM has lost over a million catfish, accompanying revenues, and reduced its work force while it has foregone further pond construction in an effort to simply try to avoid being characterized as an "environmental polluter," and while attempting to make clear that it fully intends to comply with the law — which is in itself in dispute.

3. The Agencies Overzealous Policies, Their New Attempts to Expand CWA Jurisdiction, and the Harsh Punishment Imposed on Mr. Pozsgai Requires that this Court Strictly Scrutinize the Fatal Absence of Proof in the Pozsgai Case

a. The Government Failed to Prove that Pozsgai's Property is Subject to Federal CWA Jurisdiction

As ably discussed in Mr. Pozsgai's Petition for Writ of Certiorari, pp. 10-17, the government's case is fatally flawed in that the government totally neglected to introduce any evidence of the requisite interstate commerce connection with the property which the government sought to regulate.

Even if Congress somehow intended to regulate dry property under the CWA, to do so would violate the constitutional limits on Congress' commerce clause power. While the legislative history of the CWA includes a Senate Report which "explains" that "water moves in hydrological cycles and it is essential that the discharge of pollutants be controlled at the source," S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), Congress' power to regulate "dredge and fill" "pollution" is nevertheless constrained by its power to regulate interstate commerce. Otherwise CWA jurisdiction would be co-extensive with *rainfall*, (part of the "hydrological cycle"), extending into every backyard and lawn in suburbia. Placing a large pile of rocks/sand on dry land could hardly be called an act of "water pollution." Most would readily agree, however, that the same pile in the middle of the Everglades or in the Potomac River might affect the "waters of the United States." There must, however, be a rational basis for any congressional finding that regulated activities *substantially* affect interstate commerce and the means chosen by Congress must be reasonably adapted to the end permitted by the Constitution. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Darby*, 312 U.S. 100, 121 (1941); *Katzenbach v. McClung*, 379 U.S. 241, 258, 304 (1964). *See Hodel v. Virginia Surface Mining & Reclam. Ass'n.*, 452 U.S. 264, 310-311 (1981) (Rehnquist, C.J., concurring) (regulated activity must have *substantial* effect on interstate commerce). Indeed, even in this

case, the prosecution proported to predicate jurisdiction on a waterbody used in commerce over 100 years ago; but there was no proffer of any nexus to interstate commerce today. *See* Petition for Certiorari, p. 9.

b. The Government Failed to Prove that Petitioner Discharged "Pollutants" "Into Water" as Defined in the CWA

Similarly, the harsh criminal punishment imposed requires that the Court strictly scrutinize the government's wholesale failure to prove beyond a reasonable doubt that Mr. Pozsgai commited an act of "water pollution" by placing the supposed "pollutants" "*into water.*" 33 U.S.C. §1362(6). As pointed out by Mr. Pozsgai's Petition, the underlying jury instruction was erroneously at odds with §1362(6) in that it substituted the term "wetlands" in lieu of the statutory term "water." Petition for Writ of Certiorari, p. 19, n. 9.

The "cornerstone" of the CWA is 33 U.S.C. §1311(a), which simply prohibits the discharge of any "pollutant," except in accordance with provisions as established elsewhere in the CWA, including section 404. Read logically, the "permitting" established under section 404 is only necessary for the discharge of "fill materials" which are "pollutants," as defined in 33 U.S.C. §1362(6). Accordingly, Mr. Pozsgai did not need a section 404 permit to discharge "fill material" unless the "fill material" involved was a specifically enumerated "pollutant" set forth in §1362(6). Section 1362(6) lists a number of materials, otherwise innocuous, (e.g., rock, sand, *etc.*) which do not become "pollutants" until and *unless* they are placed "into water." 33 U.S.C. §1362(6).

Any claim by the government that the term "water" means "navigable waters" or "waters of the United States" should be rejected. First, as Petitioner correctly notes, no extrinsic aids are required to discern the plain meaning of the term "water," particularly in this criminal context. Second, even if legislative intent was an issue, Congress repeatedly used terms of art such as "navigable waters" and "waters of the United States" throughout the CWA. *See* U.S.C. §§1341(a), 1342(a), 1344(a), 1344(f), and 1362(7). The definitional section in question,

§1362(6), however, uses only the term "water" — and uses it four times in that paragraph. On all *four* occasions "water" is used in *singular* form and in these instances, it would seem beyond question that "water" was intended to mean H_2O in its liquid state. As demonstrated by the very next definitional paragraph, §1362(7), Congress was very much aware of the distinction between "water" and "navigable waters" or "waters of the United States," but declined to use the latter two terms in defining "pollutant."

Ironically, a contrary interpretation would result in the government being able to sustain a conviction for "water pollution" without showing that the materials were added to water. This Court should not permit Mr. Pozsgai to suffer the draconian penalties imposed by the lower court in light of the government's absence of proof on this crucial element.

CONCLUSION

Mr. Pozsgai's Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,
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APPENDIX

APPENDIX A

EXHIBIT I

The New York Times

Reprinted from The New York Times, Tuesday, April 24, 1990

For Farmer, Wetlands Means a Legal Quagmire

By WILLIAM ROBBINS

Special to The New York Times

MARCELINE, Mo. — To the casual visitor, Rick McGown's farm looks like prime cropland. And it does what good farmland should do, yielding more than 150 bushels of corn an acre last year.

To officials of the Army Corps of Engineers, however, Mr. McGown's property is quite different. Solid as it may seem, they say, it is wetland. As wetland it is part of the waters of the United States, coming under the jurisdiction of the Corps.

The New York Times/David Hutson

Army officals say Rick McGown's Missouri farmland is actually Federal waters.

Rising Pressures Seen

Between those points of view stretches a web of arguments, legal questions, claims and counterclaims involving the Clean Water Act of 1972 — a web that has now entangled farmers, environmentalists and Federal agencies in legal disputes across the country.

legal disputes across the country. What a runaway bureaucracy wants them to do, farmers say, is convert good cropland into bogs and marshland. Furthermore, they say, the Government is doing this with total disregard of property rights guaranteed under the Constitution.

Farmers say pressures from Federal environmental agencies have increased since the Bush Administration took office and adopted a policy of trying to prevent any net loss of wetlands. But they charge that while officials have been strict with small operators, those with larger resources, like corporations and big developers, have been able to circumvent Administration policy.

And some of the farmers' representatives note that the Administration recently retreated from its own policy in response to concerns of Alaskan officials, who feared that strict application of the policy would inhibit development of oil and other resources.

But Government officials insist they are simply enforcing the law that gives the Corps of Engineers authority over the waters of the United States.

"If my country needs my land for a public purpose, let them have it," Mr. McGown, a 35-year-old farmer, said not long ago as he stood looking out over his rich soil, blackened by overnight rains. "But if they are going to take it for a public purpose, let them do it in a legal way and let the public pay for it, not send individual farmers into bankruptcy by taking away what they have spent much of their lives working for."

Mr. McGown said his farm, 255 acres that is mostly the rich low-lying fields commonly known as bottom land, has never included the "swamps, bogs and marshes" that the Corps has long regarded as necessary to define a wetland. Part of the Government's case to the contrary is based on a Federal agent's discovery of a plant that the official said was typical of wetlands. "What he was calling 'cattails' was a head of grain sorghum," Mr. McGown said, referring to a common crop used for livestock feed.

His complaint, which will soon be addressed in a Federal District Court case in St. Louis, is similar to that of several other farmers.

A neighbor, Allen Moseley, has been sued in the St. Louis court by the Corps, which charged "pollution of waters of the United States" for building a levee to guard his fields against floods. The Corps has proposed a solution under which he would agree to cede half his 187 acres to Federal control for a wildlife easement, plant trees on it and pay a fine of $7,500.

"The agreement they offered me amounted to an agreement to let me hang myself," said Mr. Moseley. "If I accept their plan, I lose the farm. It's that simple, I won't have enough cropland left to pay the mortgage."

A Justice Department lawyer representing the Federal agencies in the cases said he could not comment because they were in litigation, but he provided copies of letters to Representative Trent Lott, Republican of Mississippi, on the McGown case and to Vice President Dan Quayle on the Moseley case.

Letters Cite Defiance

Both letters, signed by Morris Kay, regional administrator of the Environmental Protection Agency, asserted that the property in question involved wetlands and that the two farmers, in defiance of the Corps of Engineers, and without first obtaining permits, had performed levee-building and clearing operations violating the Clean Water Act.

The cases involving those landowners and many others are rooted in changing laws, an evolution of attitudes of the United States toward a resource that until recently was regarded as wasteland and an effort to use the Clean Water Act of 1972, an anti-pollution statute, as a device to protect the country's diminishing wetlands.

When the first Europeans arrived in America, what is now the contiguous United States had about 215 million acres of wetlands. The most recent estimates now put that at less than 100 million acres. Much of the wetlands that was converted has been used by land developers, but the biggest parts have been converted by drainage and filling for agriculture.

The New York Times/David Hutson

Rick McGown says the Army Corps of Engineers is using the Clean Water Act to take farmlands like his buit by bit by calling them wetlands and charging farmers with polluting United States waters.

It was not until the last decade or so that environmentalists were able to persuade Congress, Federal agencies and much of the general public that wetlands had valuable functions, supporting wildlife and fisheries, protecting against floods and droughts and helping clean up pollutants before they could filter into groundwater and lakes and streams. In fact, until an executive order on protection of the wetlands was issued in 1977, the Agriculture Department actively aided and subsidized drainage projects.

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill materials into water without a permit from the Corps. And that restriction has been extended to property Federal agencies have defined as wetlands — even though the word wetlands never appears in the act.

"They are using the Clean Water Act to capture farmers' property."

While the act does contain an exemption aimed at permitting "normal farming activity," it is the interpretation of what is normal that is causing much turmoil.

The first direct Congressional action to slow the conversion rate of wetlands for agriculture was a little-noticed provision of the Food Security Act of 1985, the basic farm law. A provision of the law known informally as the Swampbuster section, bars farm program benefits for farmers who convert wetlands into tilled fields and then plant major annual crops on the converted land.

The authority of the Corps of Engineers comes from the Clean Water Act. Corps officials say that farmers can still plow and plant crops in wetlands and that if they are willing give up their farm program subsidies, they can even clear forested wetlands for farm fields. But they are prohibited from digging up stumps and taking earth balls with the roots: filling the stump holes and tearing through the fields with machinery, like bulldozers not normally used in farming.

By the Corps' interpretation, as Mr. McGown put it, "piling dirt on dirt in my fields is polluting the waters of the United States."

Farmer's Plight Begins

Mr. McGown unsuspectingly stepped into his legal quagmire when he bought the 255-acre farm in 1981. He then began to clear old fields, which he said had been in production over much of the last century but had been allowed to revert to brush in recent decades under an old Agriculture Department program known as the "Soil Bank." That program paid farmers to take land out of production.

As he and farm program executives now tell it, because he had started clearing his fields before passage of the Food Security Act of 1985 he ran into no real problems for a time.

The trouble, he said, began in 1987 when he set out to repair a break in a levee caused by a flood from a small stream and to raise the rest of the levee, which had subsided over the years, to its original height.

At that point, Mr. McGown said, agents of the Corps of Engineers arrived and told him that he was depositing fill in wetlands and that, to do that, he would need a permit. If he applied for it, the permit would cost him $10, he was told. He applied.

Except for that action, he said, he has never acknowledged that his fields were wetlands. Meanwhile, he and his lawyer say, the Government's definition of wetlands was changing.

Definition of Wetlands

In a letter issued in 1986, the Corps defined wetlands this way: "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

For emphasis it added this sentence: "Wetlands generally include swamps, marshes, bogs and similar areas." It added for further emphasis: "We have listed swamps, bogs, and marshes at the end of the definition to further clarify our intent to include only truly acquatic areas."

Never since he has owned it, Mr. McGown says, has his land included those "swamps, bogs and marshes."

Last year, without seeking public comment, a new definition was produced by the Corps and three other agencies: the Fish and Wildlife Service, the Soil Conservation Service and the Environmental Protection Agency. Under that definition, it was sufficient to class a parcel of cultivated fields as wetlands if Federal experts found that the land, if it were not being farmed, would sustain vegetation typical of life in saturated soils.

It was such an expert who found on Mr. McGown's fields the plant that he says is a cattail and Mr. McGown says is grain sorghum.

"That $10 permit could be the costliest paper anybody ever got," Mr. McGown said. To allow him to continue restoration of part of his fields and the protective levees, the Corps has proposed that, in "mitigation" for his damage to wetlands, he cede about 25 percent of his land to Federal control as a wildlife easement. Another condition of the permit is that the easement be written into the property deed as a permanent restriction for the present and all future titleholders.

Mr. McGown and his lawyer, Edwin Harvey, have sued in the Federal District Court in St. Louis asking for a declaratory judgment that his farm is not a wetland and seeking a restraining order requiring that he be let alone to farm his land without hindrance of the Federal agencies.

"Bit by bit and month by month I have lost the rights to my property," said Mr. McGown. "Bit by bit, they are using the Clean Water Act to capture farmers' property."

The Corps has asked for dismissal of the action, arguing that he is seeking what they cannot give — that they stop enforcing the Clean Water Act.

I spent $105.000 to buy the farm, $140.000 to improve it and $40,000 so far to fight them," he said. "But if they have their way, what I will have left is little more than the right to walk on it."